[fol. 268½]

EXHIBIT C TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

Sheet 1

NATIONAL MEDIATION BOARD

WASHINGTON (25)

May 5, 1950

Mr. H. R. Gernreich, Vice Pres. & Gen. Mgr.
San Diego & Arizona Eastern Railway Company
Pacific Electric Building
Los Angeles 14, California

Mr. A. Johnston, Grand Chief Engr.
Brotherhood of Locomotive Engineers
1118 BLE Building
Cleveland, Ohio.

Gentlemen:

We have an application from the Brotherhood of Locomotive Firemen and Enginemen for investigation of a representation dispute, under the provisions of Section 2, Ninth, of the Railway Labor Act, involving the following employees of the San Diego & Arizona Eastern Railway Company:

Locomotive engineers

Mr. Gernreich is requested to please furnish the number of employees covered by the above application. We shall also appreciate receiving any other statement he may care to make regarding this matter.

Records of the Board show these employees are now represented by the Brotherhood of Locomotive Engineers.

Accordingly, Mr. Johnston is requested to state the position of his organization in this matter.

Very truly yours,

/s/ T. E. Bickers
Thomas E. Bickers
Secretary

cc: Mr. D. B. Robertson, Int'l. Pres.
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland, Ohio

PLEASE MAKE SUBMISSION AND REPLY TO CORRESPONDENCE IN DUPLICATE

[fol. 269]

Sheet 2

NATIONAL MEDIATION BOARD

WASHINGTON

CASE No. R-2294

Certification

September 29, 1950

In the matter of

REPRESENTATION OF EMPLOYEES

of the

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY
Locomotive Engineers

The services of the National Mediation Board were invoked by the Brotherhood of Locomotive Firemen and Enginemen, to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of locomotive engineers, employees of the San Diego & Arizona Eastern Railway Company.

At the time application was received these employees were represented by the Brotherhood of Locomotive En-

gineers, under a certificati[illegible]ued by the Board on February 6, 1946, Case No. R-1488.

The Board assigned Mediator Wm. F. Mitchell, Jr. to investigate, and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret ballot to determine their choice using an eligible list agreed to by representatives of the contesting organizations.

Following is the result of the election as reported by the Mediator and attested on September 19, 1950, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	Brotherhood of Locomotive Engineers	Brotherhood of Locomotive Firemen & Enginemen	Number Employees Eligible
Locomotive Engineers	9	8	17

FINDINGS AND CERTIFICATION

The Mediation Board, upon the whole record and the report of the Mediator, finds that the carrier and the employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation, whereupon the Mediation Board hereby certifies that:

[fol. 269½] The Brotherhood of Locomotive Engineers has been duly designated and authorized to continue to represent for purposes of the Railway Labor Act, the craft or class of locomotive engineers, employees of the San Diego and Arizona Eastern Railway Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

/s/ T. E. BICKERS
Thomas E. Bickers
Secretary

[fol. 270]
EXHIBIT D TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

[Stamps——C. A. B.—Mar 3 1959——L. M. F.—Mar 4 1959 ——E. P. A.—Mar 4 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-68 SD&AE

Mr K. K. Schomp (2)
Manager of Personnel
Title

ATTENTION: Mr. L. M. Fox, Jr.
San Diego & Arizona Eastern
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in effect on the San Diego & Arizona Eastern Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 271] In event settlement is not reached in conference, please advise promptly in accordance with the abovementioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the

San Diego & Arizona Eastern Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR
General Chairman
General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 272]
EXHIBIT E TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

188-63

[Stamps——C. A. B.—Mar 3 1959——L. M. F.—Mar 6 1959 ——E. P. A.—Mar 6 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-36 SP

Mr K. K. Schomp (2)
Manager of Personnel
Title

Southern Pacific Company (Pacific System)
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now

in effect on the Southern Pacific Co. (Pacific System) Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such con-

ference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 273] In event settlement is not reached in conference, please advise promptly in accordance with the abovementioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the Southern Pacific Co. (Pac. System) Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR
General Chairman
General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 274]
EXHIBIT F TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

188-67

[Stamps——C. A. B.—Mar 3 1959——L. M. F.—Mar 4 1959 ——E. P. A. Mar 4 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-30 EP&SW

Mr K. K. Schomp (2)
Manager of Personnel
Title

Former El Paso & Southwestern
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in effect on the former El Paso & Southwestern Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and

all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 275] In event settlement is not reached in conference, please advise promptly in accordance with the abovementioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the former El Paso & Southwestern Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR
General Chairman
General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 276]

EXHIBIT G TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-31 SP of MEX.

Mr K. K. Schomp (2)
Manager of Personnel
Title

Southern Pacific Railroad of
Mexico, Nogales Yard, Nogales, Arizona
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in

effect on the Sou. Pac. RR of Mexico, Nogales Yard Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 277] In event settlement is not reached in conference, please advise promptly in accordance with the abovementioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the SP RR of Mexico at Nogales Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR
General Chairman

General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 278]

EXHIBIT H TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

[Handwritten—E&F 2-245]

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment)

January 26, 1955

Org. File E-10386-68 SD&AE

Mr. P. D. Robinson (2)
Vice President and General Manager
San Diego & Arizona Eastern Railway Co.
Los Angeles 14, California

Dear Sir:

Pursuant to and in accordance with Article 68 of the agreement covering engineers, dated November 30, 1938, it is our desire to reprint the agreement.

In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to present rules or corrections made, whichever is applicable.

Article 1, Section 1(a) —Extend rates. *Done*

Section 1(c) —Make corrections to meet Section 7 of the Washington agreement dated August 11, 1948. *Done*

Section 2(a) —Correct guarantee. *Done*

Article 2, Section 2(a) —Extend rates. *Done*

Article 3—No change.

Article 4, Section 1 —Correct language to be compatible with Section 16, Washington Agreement dated August 11, 1948. *Done*

Article 5, Section 1(a) —Incorporate agreements covered by:

S.P. file E-6533-6-3(a); E&F 191-279.

S.P. file E-7566-6-3(a); E&F 178-61 as amended by E&F 2-157; see your file E&F 178-16, our file E-12669-5-1(a). *Done*

Article 6, Section 3 —Apply Southern Pacific settlements covered by files:

E-11832; E&F 145-550

E-01104; E&F 2-76 *Done*

[fol. 279]

Article 7, Section 3(b) —Amend by adopting agreement dated December 19, 1944, Org. file E-10386, Co. file E&F 2-7. *Done*

Italicized material are handwritten insertions.

Section 9 —Incorporate the letter of agreement dated June 8, 1950, Org. file E-13003-7-9, Co. file E&F 1-23. *Done*

Article 8, Section 1(a) —Extend rates. *Done*

Section 1(c) —Make changes to conform with Section 9, Washington agreement dated August 11, 1948. *Done*

Article 9, Section 1(b) —Adopt Southern Pacific Section 1(b) of Article 12; also see E&F 2-7. *Done*

Section 1(c) —Adopt Southern Pacific Section 1(c) of Article 12 as amended by S.P. file E&F 2-134, Org. file E-16609. *Done*

Section 1(d) —Adopt Southern Pacific Section 1(d) of Article 12, including last paragraph. *Done*

Section 5 —Adopt settlement covered by S.P. file E&F 61-1361, Org. file E-11579. *Done*

Article 10—No change.

Article 11—No change.

Article 12, Section 5 —Adopt Section 5 of Article 15 of Southern Pacific Agreement, including all examples. *Done*

Section 6 —Make new section incorporating Southern Pacific settlement covered by our file E-16300, Co. file E&F 2-135. *1(155-604) Done*

Section 7 —Combine present Sections 6 and 7 and incorporate Southern Pacific

settlement covered by our file E-16301, Co. file E&F 2-136. *1(155-604) Done*

Section 9 —Eliminate.

Article 13—No change.

Article 14, Section 4 —Incorporate agreement dated July 18, 1945, file E-0518, your file E&F 2-4. *Done*

Section 4 —Adopt Southern Pacific settlement covered by our file E-11516, Co. file E&F 191-437. *Done*

[fol. 280]

Article 15, Section 1(b)—Follow by incorporating the Notes 1 and 2, Co. file E&F 2-7, Org. file E-10386. *Done*

Article 16—No change.

Article 17—No change.

Article 18, Section 1 —Adopt Southern Pacific settlement, Org. file E-16303, Co. file E&F 2-137. *1(157-19)10 Done*

Section 2 —Incorporate settlement dated April 25, 1951, Co. file E&F 1-28, Org. file E-13308. Eliminate question. *Done*

New Section 3 —Adopt Southern Pacific settlement, Co. file E&F 2-138, Org. file E-16303. *1(157-19)11 Done*

Article 19—No change.

Article 20—No change.

Article 21, Section 1 —Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*

Section 2 —Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*

Section 3 —Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*

Section 4 —Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*

Section 5 —Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*

Section 6 —Present Section 1(c). *Done*

Article 22—No change.

Article 23, Section 1 —Adopt Southern Pacific settlement, Org. file E-16536, Co. file E&F 2-162. *1(157-19)9 Done*

Section 2 —Adopt Southern Pacific rule, Article 27, Section 2. *Done*

Section 3 —Adopt Southern Pacific rule, Article 27, Section 3. *Done*

Section 4 —Adopt Southern Pacific rule, Article 27, Section 4. *Done*

[fol. 281]

Article 24 —Incorporate agreement dated June 27, 1950, Org. file E-13004, Co. file E&F 1-24. *Done*

Article 25, Section 1 —No change.

Section 2 —No change.

Section 3(a)—Incorporate letter of agreement dated October 27, 1942, Co. file 081-SD&AE/013-223, Orig. file E-8850. *Done*

Section 3(b)—Incorporate letter of agreement dated August 17, 1945, Co. file SD&AE E&F 1-1, Org. file E-8959. *Done*

Section 3(c)—Incorporate letter of agreement dated June 17, 1948, Co. file E&F 1-14, Org. file E-11706 and letter of agreement March 2, 1951, same files. *Done* *Considered not necessary to show in Agreement.*

Section 3(d)—Incorporate letter of agreement dated May 8, 1944, Co. file E&F 013-223, Org. file E-0515-25. *Done*

Article 26 —New paragraph, letter of agreement dated May 8, 1944, Co. file E&F 013-223, Org. file E-0516-26. *Done*

Article 27, Section 2 —Incorporate first part of Memorandum of Agreement dated May 1, 1951, Co. file E&F 1-26, Org. file 13410-27. No assignment rule to substitute for present Section 2 of Article 27. *Done*

Section 4 —Change to read 30 hours instead of 72 hours. *Done*

Article 28—No change.

Article 29—No change.

Article 30—No change.

Article 31—No change.

Article 32, Section 1 —Incorporate Memorandum of Agreement dated September 15, 1950, Co. file E&F 1-25, Org. file E-12947-32. *Done*

Section 2 —Incorporate Item 1 of Mediation *1(2-18)* Case A-2602, ^ Org. file E-7535. Apply S.P. file E-13050, Co. file E&F 2-154. ~~*1(2-18)*~~ *1(157-19)12* *Done*

Section 3 —Incorporate Item 9 of Mediation Case A-2602, Org. file E-7535. ^ *1(2-18)*

Article 33—No change.

[fol. 282]

Article 34—No change.

Article 35—No change.

Article 36—No change.

Article 37—No change.

Article 38 —Substitute Mediation Agreement A-1758 dated November 22, 1944, Org. file E-6235, Co. file E&F ~~111~~-5. *Done* *1-8*

Article 39 —Substitute Mediation Agreement A-1758 dated November 22, 1944, Org. file E-6235, Co. file E&F ~~111~~-5. *Done* *1-8*

Article 40—No change.

Article 41 —Change Section 1 and 2 to conform to Section 17 and 18, Article 32 of the Southern Pacific agreement. *Done*

Article 42—No change.

Article 43—No change.

Article 44 —Change to annual Section 1. Make Section 1(b) Section 2. *Done*

Article 45—No change.

Article 46—No change.

Article 47, Section 1(c)—Adopt the understanding reached March 9, 1951, Southern Pacific file E&F 1-775, Org. file E-13900. *Done*

Section1(d)—Correct rate. *Done*

Article 48—No change.

Article 49—No change.

Done

Article 50 —Correct rate ^ and apply settlement covered by S.P. file E&F *Done*
2-139, Org. file E-16610; ^ also Case 8 of Mediation Case A-2602, Org. file E-7535. *Done*

^
1(2-18)

Article 51—No change.

Article 52—No change.

Article 53—No change.

[fol. 283]

Article 54 —New section, S.P. file E&F 2-150, *1(157-19)13*
^ Org. file E. 16304.

Article 55 —Apply S.P. file E-3885, E&F 60-

1(157-19)14
152; ^ Items 5, 6 and 7 of Mediation Case A-2602, Org. file E-7535.

^
1(2-18)
Done

Article 56—No change.

Article 57 —Incorporate letter of agreement dated September 26, 1944, Co. file DTB-013-2, Org. file E-10455.

Article 58 —Adopt Southern Pacific agreement Article 33, *Done* Sections 5(a) and 5(b). Make Sections 1 and 2.

Article 59 —Adopt Section 6 of Article 33 of Southern Pacific agreement. *Done*

Article 60—No change.

Article 61—No change.

Article 62—No change.

Article 63—No change.

Article 64 and present 65 —Making Article 64 into Section 1 (see Org. file E-0521, Co. file E&F ~~2-44~~), and Article 65 into Section 2 of Article 64. *1-5 Done*

Article 65 —Eliminate present rule, making it Section 2 of Article 64, and adopt S.P. settlement, Org. file E-16292, Co. file E&F ~~2-127~~. *(1(157-19)8) Done*

Article 66—No change.

Article 67 —Incorporate Items 3 and 4 of Mediation Case A-2602 ^ Org. file *1(2-18)*

E-7535. Also agree to apply S.P. settlements, (Co. file E&F 2-7, Org. file E-10386). *Done*

Appendix —Vacation Agreement dated August 17, 1954, Org. file E-16158, Co. file E&F 145-10. *Done*

I ask that you agree to set a date and time when we can meet for the purpose of applying the above and rewrite the agreement covering engineers.

[fol. 284] My entire time will be taken during the month of February on Special Adjustment Board No. 18. I suggest Monday, March 7, 1955, at 9:00 AM for time to begin conference and conferences should continue daily until the agreement is signed and ready to be submitted to the printer.

Will you please advise your concurrence.

Yours truly,

/s/ J. P. COLYAR

[fol. 285]

EXHIBIT I TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

[Handwritten notations—S.D.A.E.—E&F 1-1415——PGV 9-27-61]
[Stamps—C.M.F.—Oct 2 1961——R.O.I.—Sep 25, 1961]

(Letterhead of Brotherhood of Locomotive Engineers, General Committee of Adjustment, San Francisco 3, Calif.)

September 22, 1961

Org. File E-39-1(b)

SD&AE

Mr. K. K. Schomp (2)
Manager of Personnel
San Diego & Arizona Eastern Ry. Co.
San Francisco, Calif.

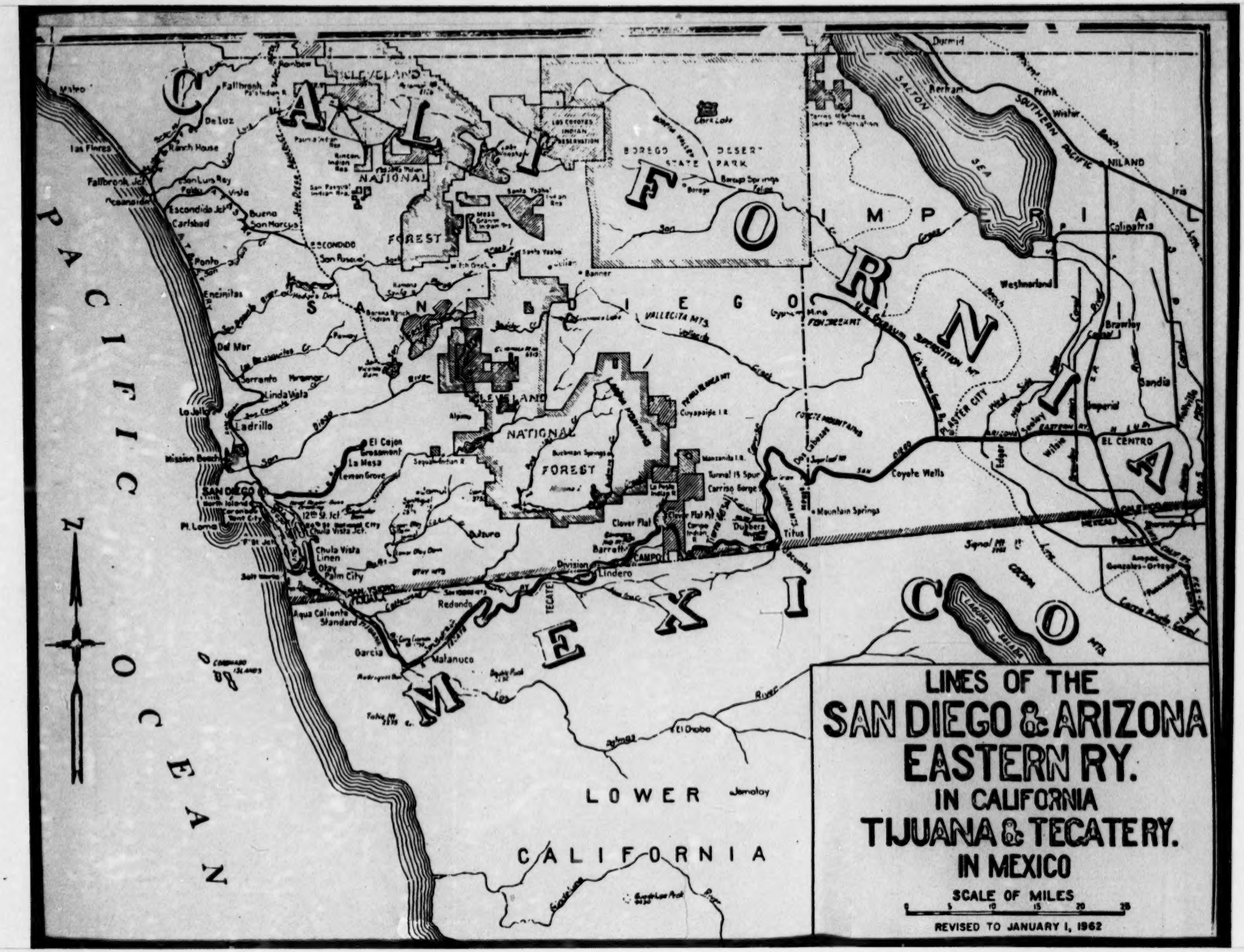
Attention—Mr. L. M. Fox, Jr.

I have been instructed by the General Committee of Adjustment to request that the settlement reached in disposing of Docket (2-13-34) Case No. 51, our File E-4069, Co. File E&F 60-120-1, on August 21, 1934, providing for the furnishing of earnings made by engineers to the Local Chairman (with copy to the General Chairman) of the BofLE, semi-monthly, be adopted on the San Diego & Arizona Eastern Railway, and to include the earnings of firemen also.

When this is done we shall have a uniform practice on all properties.

Yours truly,

/s/ J. P. COLYAR


CALIFORNIA
IMPERIAL
VALLEY
MEXICO
PACIFIC OCEAN
SALTON SEA
SAN DIEGO
CLEVELAND NATIONAL FOREST
BORREGO DESERT STATE PARK
LOS COYOTES INDIAN RESERVATION
LOWER CALIFORNIA
LINES OF THE
SAN DIEGO & ARIZONA EASTERN RY.
IN CALIFORNIA
TIJUANA & TECATE RY.
IN MEXICO
SCALE OF MILES
0 5 10 15 20 25
REVISED TO JANUARY 1, 1962

[fol. 287] Declaration of Service by Mail (omitted in printing).

[fol. 304]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

[Title omitted]

No. 2459 SD W

ORDER INDICATING INTENTION TO ENTERTAIN MOTION —August 7, 1962

Counsel for petitioner having filed NOTICE OF APPLICATION FOR ORDER INDICATING INTENTION TO ENTERTAIN MOTION UNDER RULE (60 (b)) FEDERAL RULES OF CIVIL PROCEDURE, and having stated that said counsel will apply to this Court for its order indicating to the United States Court of Appeals for the Ninth Circuit its intention to entertain petitioner's motion for relief from final judgment entered herein on October 27, 1961, and the hearing on said Application having been set for August 10, 1962, and the parties having filed briefs, exhibits and written artument, and it appearing to the Court that no further argument is necessary, IT IS ORDERED.

Said Application is deemed to have been made upon the grounds stated in said Notice; the Application is submitted, and *it is ordered:*

The Application is granted: This Court hereby indicates its intention to entertain the Motion for Relief from Final Judgment, and this indication shall not be considered as a decision upon the merits of said Motion.

[File endorsement omitted]

It is further ordered: Upon receipt of the record herein from the Court of Appeals of the Ninth Circuit, the Clerk of this Court shall notice said Motion for Relief from Final Judgment for hearing; not later than three days prior to the date of said hearing, the parties shall file any [fol. 305] further affidavits, briefs, offers of proof, etc. which they may wish to present to the Court for decision upon said Motion and shall inform the Court whether they wish oral argument upon said motion, or whether they wish to submit said motion without argument.

In the event the parties wish to introduce oral evidence, an offer of proof shall first be filed as indicated in the preceding paragraph.

Dated August 7, 1962.

/s/ JACOB WEINBERGER
U. S. District Judge

[fol. 306]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

OPINION—March 29, 1963

On March 22, 1957, the petitioner herein filed a petition in the Central Division of the Court to enforce an award made by the National Railroad Adjustment Board on his claim against the defendant. The case was transferred to this Division, and is No. 2080-W in the Clerk's records. Subsequently, and on September 2, 1960, in this case he

[File endorsement omitted]

filed another petition to enforce a subsequent related award. The history of his claim and decisions of this Court in both cases are set out in opinions published in 161 F. Supp 295(1958) and 198 F. Supp 402 (1961).

On October 27, 1961 this Court granted a motion for summary judgment in favor of the defendant. Plaintiff filed an appeal, and during the pendency thereof and on June 5, 1962, petitioner noticed for hearing before this Court a motion for relief from the judgment and asked this Court to indicate to the Court of Appeals of the Ninth Circuit whether it would entertain said motion. [fol. 307] On August 7, 1962, this Court filed its indication that it would entertain said motion, and ordered:

> "Upon receipt of the record herein from the Court of Appeals of the Ninth Circuit, the Clerk of this Court shall notice said Motion for Relief from Final Judgment for hearing; not later than three days prior to the date of said hearing, the parties shall file any further affidavits, briefs, offers of proof, etc. which they may wish to present to the Court for decision upon said motion, and shall inform the Court whether they wish oral argument upon said motion or whether they wish to submit said motion without argument.
>
> "In the event the parties wish to introduce oral evidence, an offer of proof shall first be filed as indicated in the preceding paragraph."

On September 21, 1962 this Court set the motion for hearing on October 4, 1962, and requested counsel to follow the procedure outlined in the order from which we have just quoted. Briefs and affidavits were filed. No offer to introduce oral testimony was made by either party. On October 4, 1962 a hearing on the motion for relief from the summary judgment was had, at which counsel for the parties made oral argument. A transcript of these proceedings is on file. The Court made certain queries of counsel and permission was requested to file further briefs; further briefs and affidavits were filed, and the motion submitted for decision.

* * * * * * *

[fol. 308] In case No. 2080-W as well as in this case, petitioner contended that the effect of each award was to order the defendant to reinstate him in its active service and give him back pay from the time he had been retired from service in 1954. The Board had ruled that a three-physician panel should examine Mr. Gunther and make the decision whether Mr. Gunther, at the time he was retired, was physically fit for active service.

In this case, the Court made findings of fact pursuant to which it granted defendant's motion for summary judgment. Two of such findings are of particular significance to the instant motion:

"10"

"At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from active service."

"11"

"At all time pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision for a board of physicians to review the findings of defendant's physicians as to physical disqualification of its employees."

Three collective bargaining agreements on file as exhibits in this case are referred to by counsel as bearing on the issues for decision in the instant motion. They are:

(1) "The Green Covered Booklet" whose cover has the notation "Agreement San Diego & Arizona East-[fol. 309] ern Railway Company and Brotherhood of Locomotive Engineers Rules effective March 1, 1935, revised rates of pay effective October 1, 1937."

This booklet has been referred to in briefs and argument as the "agreement signed November 30, 1938" or

the "1938 Agreement" or the "1935 Agreement." We shall refer to it by the color of its cover.

> (2) "The Orange Covered Booklet" whose cover has the notation "Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers Effective January 1, 1956."

We shall refer to this agreement as "The Orange Covered January 1, 1956 Agreement."

> (3) "The Red Covered Booklet" whose cover has the notation "Agreement by and between *Southern Pacific Company (Pacific Lines)* (Excluding the former El Paso and Southwestern System) and its Locomotive Engineers represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, Effective August 1, 1958."

We shall refer to this agreement as "The Red Covered Booklet of August 1, 1958."

Throughout the progress of the prior case (2080-W) as well as this case, and until the filing of the instant motion, counsel for petitioner, as well as counsel for the defendant, stated and restated that the Green Covered Booklet contained the collective bargaining agreement which was in effect at the time Mr. Gunther was disqualified from service on defendant's line in 1954. While all parties admitted the Green Covered Booklet contain no mention of a board of physicians or three-doctor panel, [fol. 310] counsel for petitioner maintained that the following portions of the agreement (Green Covered Booklet) upon which he relied, would, if properly interpreted, limit the right of the employer to terminate employment by reason of physical unfitness:

"*Article 35—Seniority*

"Section 1

" 'Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.'

"Section 3 (b)

" 'Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment.'

"*Article 38—Reduction of force*

"Section 1 (a)

" 'When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

• • • •

" 'Second: That when the reductions are made they shall be in reverse order of seniority.' "

"*Article 47—Investigations*

"Section 1 (b)

" 'No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.'

[fol. 311] "Section 1 (e)

" 'If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix "B" for time lost on such account.' "

(Petitioner's brief filed February 10, 1958, p. 2.)

Petitioner now contends that on November 13, 1947, and prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956 (he refers to the Orange Covered Booklet) an addition was made to the agreement contained in the Green Covered Booklet, to-wit, a provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by establishing a three-physician panel.

Petitioner relies upon the affidavit of J. P. Colyar filed in support of his motion, his own affidavit, and numerous exhibits attached to the affidavits, and upon the records and files of this case and the previous case. (2080-W).

Briefly, Mr. Colyar's affidavit states that he is at the present time, and has been since August 22, 1947, the Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines) and four other railroads, including the defendant's; that in his capacity, it has been his responsibility to negotiate terms and conditions of employment of locomotive engineers in the employ of said carriers and to adjust claims and grievances arising under existing collective bargaining agreements between the carriers and the Union. Mr. Colyar further recites that since 1935 the Brotherhood of Locomotive Engineers has been designated by the National Railroad Mediation Board [fol. 312] as a representative of locomotive engineers employed on defendant's railroad. He then states that the Green Covered Booklet, when it was printed, contained all the terms of the agreement between the Union and the SD&AE railroad, but that prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956, there were many modifications and additions to the agreement, and that one such addition was the provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the establishing of a three-doctor panel to make such determination.

He then states that this addition resulted from certain correspondence, copies of which he has attached to his affidavit as exhibits. He refers to Exhibits A, B, C, D, E, F, G, H, I and J, correspondence dated within the period beginning June 3, 1944 and January 4, 1945 between a predecessor General Chairman for the Brotherhood of Locomotive Engineers, and the Vice-President and General Manager of defendant railroad, Mr. Gernreich, as establishing an agreement between the organizations represented by the correspondents. He states that this agreement was that provisions of the agreement between the Union and defendent railroad which were worded identically to provisions of the agreement between the Union and the Southern Pacific (Pacific) lines, would receive the same interpretation. Mr. Colyar then refers to Exhibits K and L as establishing an interpretation to Article 12, Section 1 of the Southern Pacific agreement with the Union; the interpretation provided for the adjustment of disputes between carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the appointment of a three-physician panel to [fol. 313] make such determination; he further states that because of such interpretation, and because Article 9, Section 1 (c) of the SD&AE agreement was identically worded, the said SD&AE agreement contained such a provision for such a three-physician panel, on and after November 13, 1947. That such provision remained in said SD&AE agreement in the form shown in Exhibits K and L until December 1, 1959 when it was changed through his request (Exhibit M) to the form shown on Exhibit O, and made an addition of Article 35 of said agreement.

Both counsel agree that a motion of this sort should not be granted unless

> "(a) The evidence which he (movant) brings to the attention of the Court for the first time is not merely cumulative but, if considered by the Court, would probably lead to determination of defendant's motion for summary judgment in petitioner's favor.

"(b) The evidence was not in his possession at the time of the hearing on the motion for summary judgment and due diligence on his part would not have altered this situation."

(Quoting from petitioner's brief, filed November 19, 1962, citing Phillipine National Bank v. Kennedy, (App. D.C. 1961) 295 F. 2d 544; Greenspahn v. Joseph E. Seagram & Sons, CCA 2, 1951) 186 F. 2d 616; Baruch v. Beech Aircraft Corp. (CCA 10, 1949) 172 F. 2d 145.)

Approximately 7 years have elapsed between the disqualification of Mr. Gunther from service of the defendant and the rendition of the judgment of this Court from which relief is here sought. Prior to such judgment, petitioner's present counsel represented him in the U. S. District Court in proceedings to enforce awards of the Ad- [fol. 314] justment Board over a period of nearly 4 years. There is correspondence among the exhibits filed with reference to this motion showing that as early as 1958 Mr. Colyar, on behalf of Mr. Gunther, had written defendant with regard to the enforcement of the award and restoring Mr. Gunther to service, and that as early as March 29, 1960, Mr. Colyar was on record, in behalf of the Brotherhood of Locomotive Engineers as Mr. Gunther's representative, in handling petitioner's case.

We find nothing in the record to justify petitioner's failure to discover and present to the Court prior to the rendition of judgment, the evidence he now proffers.

Recourse to statements in affidavits filed by the defendant is not necessary for us to see that petitioner has not produced and would not be able to produce at a trial, any evidence which could lead to a determination in his favor.

A most adequate analysis of the newly discovered evidence and its effect is presented in the brief of defendant filed December 26, 1962. We are in accord with the observations made by defendant's counsel in such brief and expressly note with approval the language beginning with line 17, page 8, to the end of said brief.

In addition, we make these observations as to matters which have occurred to us after a careful study of the

correspondence in Mr. Colyar's affidavit, other correspondence of Mr. Colyar on file herein and the three booklets containing collective bargaining agreements.

We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE railroad. (The [fol. 315] agreement *was* amended in 1959 to include such a provision). A detailed examination of the reprinted agreement (Orange Cover, January 1, 1956) shows no reference whatever to such a panel.

The Court queried counsel for petitioner at the hearing as to why the provision regarding a three-doctor panel was not included in the reprinted agreement (Orange Cover) of January 1, 1956 if the same had been made applicable to engineers on the SD&AE. In his brief filed after the hearing counsel for petitioner suggested that "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there."

Attached to the affidavit of K. K. Schomp filed July 23, 1962 are a number of photostatic copies of letters and notices from Mr. Colyar to the various railroads, including the SD&AE, signed by Mr. Colyar as General Chairman of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers. Under date of January 26, 1955 (preceding the reprinting of the agreement between the Union and the SD&AE in January of 1956) we find a copy of a letter from Mr. Colyar to Mr. P. D. Robinson, Vice President and General Manager, San Diego & Eastern Railway Company. Mr. Colyar states:

> "Pursuant to and in accordance with Article 68 of the agreement covering engineers, dated November 30, 1938, it is our desire to reprint the agreement.

"In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to present rules or corrections made, whichever is ap-
[fol. 316] plicable."

Then follows a list enumerating each article of the Green Covered Booklet (1 to 67 and appendix) with a typewritten notation after each number of an article, such as "Apply Southern Pacific Settlements covered by files . . . ", or "Correct guarantee", or "Extend rates", or "No change", or "Eliminate", and so on. Referring to Exhibit H of Mr. Colyar's affidavit upon which petitioner relies, we note that the additions set forth in such letter as those to which the railroad is agreeable, to-wit, additions, etc. to Articles 7, 9 and 15, are included word for word in said numbered articles of the reprinted agreement (Orange Cover) of January 1, 1956. Opposite the words "Article 35" in Mr. Colyar's list of changes for the 1956 reprint are the words "No change", and said reprinted agreement (Orange Cover) discloses no change in said article.

Further, we observe that in Exhibit "H" the SD&AE official, Mr. Gernreich, after listing the additions to which he is agreeable, including the statement that interpretations of the SP agreement may be applied to similarly worded rules of the SD&AE agreement, says: "Upon receipt of your concurrence, necessary instructions will be issued". The reply letter from Mr. Peterson for the Union thanks Mr. Gernreich for granting the additions and changes to Articles 7, 9 and 15, but mentions no "concurrence" with reference to similar interpretations.

We note also that Mr. Colyar's connection with the Union as Chairman, General Committee of Adjustment Brotherhood of Locomotive Engineers, did not begin until several years after the correspondence regarding similar interpretations was exchanged.

We might also point out that had the Union forwarded [fol. 317] its concurrence as to similar interpretations; had Exhibits K and L (referring to the case of an engineer on a road other than the SD&AE) been susceptible of ap-

plication under any similarity of interpretation agreement, there was not similarity between the cases of engineer Caloway and engineer petitioner; had there been similarity between the cases, we must point out that nothing was stated in Exhibit K or L to the effect that the decision of a majority of a three-physician board was controlling on either party; had there been such a statement, the panel of three-physicians, under the wording of Exhibits K and L was obligated to determine whether the engineer had the physical ability to conform to certain standards prescribed by the company. (It was emphasized in each of Exhibits K and L that the railroad had the responsibility of prescribing physical standards).

Finally, if every other contention petitioner has made could be resolved in his favor, there would still be present these pertinent facts: that the Adjustment Board could not have been proceeding under the provisions of Exhibits K and L, because there is no direction in the Board's order that the third physician on the panel should be a specialist in the disease from which petitioner was suffering; there is no order that the three-physician panel should decide the engineer's ability to conform to *company prescribed physical standards;* there is no showing as to what standards the company prescribed, and there is no reference to any company prescribed standards in the reports of the three-physician panel to the Railroad Adjustment Board.

Petitioner argues that the affidavits and exhibits supporting the instant motion are sufficient at least to raise a factual issue which must cause us to set aside the summary judgment and try the case on its merits.

[fol. 318] As we have heretofore indicated, both parties were given the fullest opportunity to present what evidence they had prior to the hearing on this motion. Inquiry was made if either party desired to present oral testimony in support of or in opposition to the motion. None was offered. We assume that if the judgment were set aside, petitioner's case would rest, as it does now, on Mr. Colyar's and Mr. Gunther's affidavits and the docu-

ments and exhibits filed in this case and the preceding one. It appears to us that were we to set aside the judgment, petitioner would be in much the same position as he was when he opposed the motion for summary judgment: pressing for an "interpretation" by the Court, of agreements, documents and correspondence which are all in the record before the Court. No factual issue was raised prior to the decision on the motion for summary judgment, and none has been raised by the motion for relief from such summary judgment.

The motion for relief from judgment should be denied.

Dated this 29th day of March, 1963.

Jacob Weinberger, United States District Judge.

[fol. 319]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

ORDER DENYING MOTION FOR RELIEF FROM FINAL JUDGMENT —April 10, 1963

On June 4, 1962, petitioner filed a Notice of Motion for Relief from the judgment of this Court entered October 27, 1961, in the above-styled case. The notice set forth the grounds for the motion as "1. Mistake, inadvertence,

[File endorsement omitted]

surprise or excusable neglect; 2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; and 3. For other reasons justifying relief from the operation of said judgment." Affidavits of Messrs. Gunther, Colyar and Decker were filed in support of the motion. A notice of motion for an order of this Court indicating an intention to entertain the motion for relief was filed at the same time, which, if granted, would permit petitioner to seek an order of remand from the Court of Appeals for the Ninth Circuit where the action was pending. On August 7, 1962, this Court issued its order indicating intention to entertain [fol. 320] the motion. Thereafter the matter was argued before this Court and fully briefed by the parties and submitted. On March 29, 1963, this Court issued its opinion analyzing all of the evidence proffered by petitioner, the affidavits, documents, and the legal arguments involved in this motion. The record demonstrates that there is no valid support for the contentions of mistake, inadvertence, surprise or excusable neglect; that the evidence offered was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial; that even if the judgment were vacated in order to receive the evidence offered in the record it would not justify a different conclusion or judgment, and that there have been presented to this Court no reasons justifying relief from the operation of the said judgment.

Accordingly, It Is Ordered that the motion for relief from final judgment be, and the same hereby is, denied.

Dated this 10th day of April, 1963.

Jacob Weinberger, United States District Judge.

[fol. 321] Declaration of Service by Mail (omitted in printing).

[fol. 322]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

NOTICE OF APPEAL—Filed April 24, 1963

Notice Is Hereby Given that F. J. Gunther, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Denying Motion For Relief From Final Judgment entered in the docket on April 10, 1963.

Dated: April 17, 1963.

Hildebrand, Bills & McLeod, Charles W. Decker,
By Charles W. Decker, Attorneys for Petitioner.

[File endorsement omitted]

[fol. 323] Proof of Service by Mail (omitted in printing).

[fol. 330]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Docket

2459-SD-W

Jury

Jury demand date: 4-24-61

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Respondent.

[fol. 331] 2459-SD-W

DOCKET ENTRIES

DATE	PROCEEDINGS
9/26/60	Fld petn to enforce award & ord of Nat'l RR adjustment Board. Sums mailed to atty in San Francisco. Md JS-5.
11/15/60	Fld sums svd as to each deft.
11/28/60	Fld not of mot & mot for summy judgt noticed for 12/14/60 2 PM. Fld memo of pts & auths. Fld affid K. K. Schomp. Lodged judgt.
12/ 2/60	Fld ord for con't from 12/14/60 to 12/19/60, 10am for hrg mot for summy Judgmt (W). Fld supplemental affid of K.K. Schomp.
12/12/60	Fld petnr's memo in oppos to mot for summy judgmt.

DATE	PROCEEDINGS
12/19/60	At req of counsel, ord submitted w/o argument (W).
3/27/61	Ent ord deft mot for summary jdgmt as to grounds labelled 1 & 11 is denied. Copies sent to counsel. (Fld courts memo opinion (W)
4/10/61	Fld ord allowing deft up to & including 4/24/61 in which to ans or move fur in response to petn on file (W)
4/24/61	Fld ans of deft. Fld demand for Jury Trial.
5/ 9/61	Fld assoc of attys & ord thereon (W).
5/16/61	Fld not of mot & mot for summy jdgmt, notce for 5/29/61, 2 P.M. Fld affid of K. K. Schomp. Fld memo of pts & auths. Fld proposed findgs of fact and con of law. LODGED proposed judgmt.
5/29/61	Fld petners memo in oppos to mot for smmy jdgmt. Fld petnrs affid in oppos to mot for summy jdgmt. Hrg mot for summy jdgmt & settg for P/T & settg for Trial. Both sides argue Ord cont to 7/3/61, 10 A.M. for fur procs or submssn (W).
6/26/61	Ent ord fur proceedngs or submission in the above-entitled matter is cont to 7/21/61, 10 A.M. (W). Copies to counsel.
7/21/61	Ord matter submitted (W)
9/27/61	Filed opinion (W). Ent min ord that within 10 days deft will srv findgs, con of law and jdgmt in conformity with opinion; petnr may have 5 days after srv file objects as to form only (W)
10/27/61	Fld order granting defts motion for summary judgment, that award of First Division, National

DATE	PROCEEDINGS
	Adjustment Board dated 10/8/58 is set aside, and awarding defts costs. (W) (Ent 10/27/61 and not attys) JS-6
10/30/61	LODGED proposed findings of fact, conclusions of law & jdgmt.
11/ 6/61	Fld not of ent of jdgmt.
11/27/61	LODGED & Fld Not of Appeal LODGED & Fld stip & waiver re bond for costs on appeal & ord thereon (W)
1/ 4/62	Fld ord extending time for flg record on appeal to 2/25/62 & Docketing Appeal (W)
2/ 1/62	Fld designation of portions of the record to be contained in record on appeal Fld statements of pts on which appellant intends to rely on appeal.
2/ 8/62	Fld appellees' designtn of portns of record to be contained in the record on appeal
2/12/62	Issd & fwd to CA transcpt rec on appeal (orig docs)
5/31/62	Fld rep'trs transcript of proceedings
6/ 5/62	Fld petnrs not of mot for relief from final jdmt. noted for 6/25/62 2 P.M. Fld affd of Charles W. Decker, F.J. Gunther, J. P. Colyar.
6/ 7/62	Fld not of application for ord indicating intention to entertain motion under Rule 609(b) noted for 7/9/62, 2 P.M.
6/18/62	Fld stip with mot thereon for contg hrg upon mot for relief from operation of jdgmt pursuant to rule 60(b). Fed rules of Civil Procedure, cont to 7/9/62, 2 P.M. (W)
7/ 2/62	Ent minute ord herg mot for relief from operation of jgmt is cont to 7/13/62, 10 A.M. (W)

DATE	PROCEEDINGS
7/ 9/62	Fld affid of C. M. Buckley; K. K. Schomp, C. A. Ball, L. M. Fox, Jr; W. A. Gregory
7/13/62	Ord hrg on applic for ord indicating intent to entertain mot under Rule 60 cont to 7/27/62, 10 A.M. (W) Ent min ord that mots of pltf heretofore set for 7/13/62 cont to 7/27/62, 10 A.M. Counsel directed to file any additional af of memos by 7/23/62 (W)
[fol. 332]	
7/23/62	Fld supp affid of K. K. Schomp.
7/27/62	Hrg applic for ord indicating intention to entertain mot under Rule 60(b) cont to 8/10/62 10 AM at req of counsel (W)
8/ 7/62	Fld ord indicating intention to entertain motion: ord applic granted (W).
8/24/62	Fld c.c. ord for remand & rec'd transcript of record from the C.A.
9/21/62	Ord pltf mot for relief from final jdgmt is set for hrg on 10/4/62, 10 AM and counsel will follow proceed outlined in Cts ord of 8/7/62 (W)
10/ 4/62	Hrg mot for relief frm final jdgmt; fld supplemental affid of J. P. Colyar; ord counsel for pltf given 20 days to summarize argument and deft given 20 days thereafter to reply and pltf given 10 days to respond to defts argument; ord cont to 12/10/62, 2 P.M. for fur procdgs or submission (W)
11/19/62	Fld petnrs memo in suppt of mot pursu to Rule 60(b).
12/ 7/62	Fld stip counsel have to 12/21/62 to file ans and petn have 5 days of recpt by him to file reply brief; hrg with respect to fur procdgs or sub-

DATE	PROCEEDINGS
	mission be cont to such date convenient to Crt. Fld ord cont fur proedgs or submsn of matter to 1/4/63, 2 P.M. (W)
12/26/62	Fld defts memo in oppos to mot pursu to Rule 60(b)
12/26/62	Ent min ord that pltf hav to 1/4/63 to file reply brief; ord cont fur proedgs or submission frm 1/4/63 to 1/11/63, 2 P.M., couns need not be present unless notifd (W)
1/ 3/63	Fld petnrs reply memo on submission of mot pursu to Rule 60(b).
1/11/63	Ord submitted (W)
3/29/63	Fld Opinion. Ent min ord that counsel for deft w/i 10 days sv and submit ord denying petnrs mot for relief in accord with opinion fld this day (W)
4/10/63	Fld ord denying motion for relief from final judgment. (W) (ENT. 4/10/63)
4/24/63	Fld stip and waiver of Bond for costs on appeal and ord thereon (W) Fld notice of Appeal.
5/ 2/63	Fld designation of the portions of record to be contained in the record on appeal.
5/ 8/63	Fld appellee's designation of additional portions of record to be contained in the record on appeal.
6/ 4/63	Issd & fwd to CA, transc rec on appeal (orig docs)
10/26/64	Fld cc judgment CA affirming judgment of this court. (Ent 10/26/64) Ord jdgmt of Court of Appeals filed in this court (W)

[fol. 336]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,724

F. J. GUNTHER, Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a coporation, Appellee.

On Appeal from the United States District Court for the Southern District of California, Southern Division.

OPINION—September 4, 1964

Before: Pope, Hamley and Merrill, Circuit Judges.

MERRILL, Circuit Judge:

Appellant initiated this proceeding on November 28, 1960, by filing in the District Court for the Southern District of California a petition under 45 U.S.C. 153(p),[1] seeking enforcement of an award and order of the First Division of the National Railroad Adjustment Board. That award and order directed that appellant be reinstated by the Railroad

---

[1] "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court * * * a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C. 153(p) (1958).)

[Ed. 2d] to active employment, with pay for lost time. The Railroad successfully contended before the District Court that the award and order was made in excess of the jurisdiction of the Adjustment Board, and was therefore not subject to a judicial order of enforcement. Summary judgment was rendered in favor of the Railroad. Appellant subsequently moved, under F.R.C.P. Rule 60(b), to be relieved of judgment on the ground of newly discovered evidence. This motion was denied by the court. Appeals from both the judgment and subsequent order were taken and have been consolidated.

On December 30, 1954, shortly after appellant's seventy-first birthday, the Railroad removed him from active service. He had been employed by the Railroad since December, 1916, and his employment since December, 1923, had been as locomotive engineer.

The record establishes without dispute[2] that appellant's removal was under the following circumstances:

> "Locomotive engineers employed by the San Diego & Arizona Eastern Railway Company are and have always been required to take and pass periodic physical examinations and reexaminations to determine their fitness to remain in service. In the year 1954 these requirements provided, and they still provide, that employes of age seventy and over must take and pass such a physical examination every three months. In accordance with the foregoing rule, Mr. Gunther reported for physical examination on November 24, 1953, and for additional examinations (reexaminations) in each successive three-month period to and including December 15, 1954. On the latter date Mr. Gunther reported for and took his physical examination; and on the basis of the findings during this examination the examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gun-

[2] By affidavit of appellee's personnel manager.

that's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon [1a, 22b] this conclusion, Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954."

Following removal, appellant submitted to an examination by a physician of his own choice, and on the basis of that doctor's favorable report requested of the Railroad that a three-doctor board be appointed to reexamine his physical qualifications for return to service. When this request was denied appellant filed with the Railroad Adjustment Board a claim for reinstatement and back pay. The claim was presented on appellant's behalf by the Brotherhood of Locomotive Firemen and Enginemen, of which organization appellant was a member and officer. The designated collected bargaining representative of the Railroad's employees, however, was the Brotherhood of Locomotive Engineers and it was the contract reached between that organization and the Railroad which constituted the applicable collective bargaining agreement.

Before the Adjustment Board appellant's claim was opposed by the Railroad on the ground that there was no rule providing for the appointment of a neutral medical board and that the Railroad's judgment of appellant's fitness, based upon the decision of its Chief Surgeon, was not subject to review.

The Board nevertheless ordered a neutral board to be established. Its order of October 2, 1956, provided:

> "It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employee has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service. If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physi-

cal condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue re- [161 339] *quires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.*

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians. If the decision of the majority of such board shall support the decision of carrier's chief surgeon, the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians."

Appellant was duly examined by the neutral board and the Adjustment Board subsequently found "that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer." The claim of appellant was sustained with pay for all time lost from October 15, 1955. It is for enforcement of this award and order that this proceeding was instituted.

The function of the Railroad Adjustment Board is set forth as follows in 48 Stat. 1189 (1934), 45 U.S.C. 153(i) (1958):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner [fol. 340] up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The First Division of the Board, by § 153(g), is given authority over disputes involving engineers.

The issue here is whether any dispute growing out of a grievance or question of contract interpretation is presented by appellant's removal from active service upon the ground of physical disqualification. We agree with the District Court that no such dispute is presented.

It is clear from the record that the Railroad has always reserved to itself the right and responsibility of determining the qualifications of its employees, including, importantly, the physical fitness of its locomotive engineers. It would seem to us to be a most elementary proposition that in the public interest the responsibility for such determinations must be clearly fixed, and that in the absence of contrary provisions in the applicable collective bargaining agreement such responsibility must rest with the Railroad.[3]

---

[3] While it may well be that an arbitrary exercise of its rights and responsibilities by the Railroad could form the basis of a grievance, the Board's own order, as we have heretofore quoted it, states that reinstatement should be limited to such cases. If, states the Board, there is a lack of good faith in the removal or lack of a

[fol. 341] There was no contrary provision in the contract between the Railroad and the Brotherhood of Locomotive Engineers as of the date of appellant's removal.

Appellant refers us to the contract's general provisions respecting seniority rights and right to continue active employment in the absence of good cause for discontinuance thereof.[4] It is clear from a reading of these provisions that

---

fair standard of fitness or adequate determination, the claimant has been wrongfully removed. Otherwise, states the Board, there is no right to reinstatement.

Nowhere in the record do we find any suggestion of a lack of good faith on the part of the Railroad, or that absence of the likelihood that an acute coronary episode might be suffered is not a fair standard of fitness for a locomotive engineer; or that the determination of the Railroad surgeons was not "adequate" (which we would suppose to relate to the qualifications of the medical examiners and the sufficiency of their examination). The record simply shows that a "majority" of the neutral board disagreed.

[4] "Article 35—Seniority

Section 1

Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.

Section 3 (b)

Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Gunther affidavit filed May 29, 1961. R. 100.)

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account.

Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if

they deal with discharge for cause, which is not to be confused with physical disqualification.

In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it.

Appellant contends that the determination of this dispute by the Adjustment Board and its decision to entertain the dispute should be accepted by this Court under the arbitration-encouraging rules laid down in *United Steel Workers* [fol. 342] *v. Warrior & Gulf. Nav. Co.* (1960) 363 U.S. 574; *United Steel Workers v. American Mfg. Co.* (1960) 363 U.S. 564, and decisions of like import.

We do not find that line of authority in point. Those cases arose under § 301 of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), and dealt with arbitration provisions of collective bargaining agreements. In those cases the parties were required to resolve their disputes as to the contract's meaning by a method upon which they had themselves agreed. Here the parties have not agreed to arbitration. Resolution of their disputes by the Adjustment Board is imposed by statute and the basic issue is not as to the meaning of what the parties have said but the meaning of what Congress has stated. Congress has (see footnote 1) provided for judicial review of the Board's decision and that the Board's findings and order shall be "prima facie evidence of the fact." The reviewing court is authorized tc enter such judgment "as may be appropriate to enforce or set aside the order * * *." It would seem apparent that Congress intended that the courts should have full power to review the question whether a dispute as defined by Congress (rather than by the parties themselves) exists.

---

they so elect, displace any fireman their junior under the following conditions:

Second: That when reductions are made they shall be in reverse order of seniority." (Gunther affidavit filed May 29, 1961. R. 100.)

Appellant asserts that in any event summary judgment was a premature and precipitate disposition of the case upon the merits, and that issues of fact were presented or suggested by the record. In this connection it contends that the record on motion for summary judgment did not show that the collective bargaining agreement before the court was the complete agreement, but on the contrary showed that it had been amended in some respects, thus suggesting that it might have been amended in others as well; that with respect to the extent of appellant's rights the agreement was vague and uncertain, and that these uncertainties remained to be resolved.

We agree with the District Court that however vague and uncertain the agreement before it might have been as to appellant's rights in other respects, it is clear that it conferred on him no right to challenge the Railroad's good-faith judgment as to his physical fitness. If the agreement between the parties in any material respects had been amended, appellant had ample opportunity to present this fact on motion for summary judgment. The motion granted [fol. 343] was the second motion made by the Railroad. The first had been denied in order to give appellant the opportunity to present evidence respecting the contract. *Gunther v. San Diego & A. E. Ry.* (S.D.Cal. 1961) 192 F. Supp. 882. The Court explicitly pointed out in this respect:

> "If counsel for the petitioner denies that Exhibit A of said affidavit as the same appears in the Clerk's file, is not the contract in controversy, then there is, of course, need for clarification." 192 F.Supp at 887.

Appellant was also invited to show, by affidavit, what ambiguities in the contract he had in mind, and what parol evidence he deemed important in resolving them.

It was only when appellant failed to respond to the Court's invitation that, on a renewed motion, summary judgment was ordered. Under these circumstances this was not error.

Judgment is affirmed.

On appeal from the order denying his § 60(b) motion, appellant contends that the Court improperly rejected his newly discovered evidence.

The record before the District Court showed that while, at the time of appellant's removal from active service, there was no agreement that physical fitness was to be decided by a three-doctor panel, such an agreement was reached in 1959. Appellant by his newly discovered evidence sought to prove by correspondence between the Southern Pacific Company (appellee's parent) and the Brotherhood of Locomotive Engineers that in fact such an agreement had been reached in 1944, ten years before his removal.

The Court ruled "that the evidence offered was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial."

Appellant attacks this determination. He explains his delay in learning of this evidence by the fact that he was a member not of the Brotherhood of Locomotive Engineers but of a rival union and that the correspondence establishing the agreement was not available to him.

[fol. 344] This may explain a lack of knowledge but it does not justify a failure to search or to inquire. More than a year passed between the denial of the Railroad's first motion for summary judgment (and the Court's invitation to appellant to present evidence of the agreement) and the filing of appellant's 60(b) motion. Denial of the motion under these circumstances was neither error nor abuse of discretion.

On its order denying 60(b) relief, the Court is affirmed.

[fol. 345]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,724

F. J. GUNTHER, Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Appellee.

JUDGMENT—Filed and Entered September 4, 1964

Appeal from the United States District Court for the Southern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 346]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18724

F. J. GUNTHER, Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Appellee.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Frank H. Schmid, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing transcript of record containing three hundred and forty-six (346) pages, numbered from and including 1 to and including 346, to be a full, true and correct copy of the entire record, including original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to the request of counsel for the appellant Gunther, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, 1964.

William E. Wilson, Frank H. Schmid, Clerk.

[fol. 347]

SUPREME COURT OF THE UNITED STATES

No. 733, October Term, 1964

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY.

ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.